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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 902

MAURICE A. WHEELER, Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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For the sake of clarity, we feel constrained to make short answer to Respondent's Brief because we believe that the questions propounded by the Government in its Brief do not state correctly the position of the petitioner and the problem which the petitioner poses before your Honorable Court in his application for Certiorari.

Point I

Specifically, the matters contained in the first question raised by the Respondent are incorrect. What the petitioner is asking the Court to consider on the Petition for Certiorari is as follows: May an Internal Revenue Agent, an employee of the Government of the United States, practice fraud and deceit to obtain evidence

against a person and use such evidence against him in a criminal proceeding in violation of the Fourth and Fifth Amendments to the United States?

The Honorable Wallace S. Gourley, Chief Judge, the only one who heard all of the evidence on Preliminary Motions, found that such fraud and deceit was so practiced on the petitioner.

Point II

The Respondent's Argument (Pages 9 and 10) to Question No. 2 is incorrect and inconclusive because it fails to take into consideration the fact that two District Court Judges heard the testimony on the Motion to Suppress and came to opposite conclusions. It is our contention that the conclusion reached by the Honorable Wallace S. Gourley, Chief Judge, was based on additional evidence which was not heard before the first Judge who took testimony on the Motion to Suppress. But assuming, as the Third Circuit Court did, that no new points were raised in the additional evidence, it is still a fact that two District Judges disagreed on the facts and came to different conclusions. This clearly indicates that there was a significant conflict in the evidence.

There is an additional factor which is overlooked by the Respondent and that is the specific direction by the first Trial Judge that:

> "After consideration of the facts above set forth, in the light of the foregoing authorities, the court is of the opinion that defendant's motion should be denied, *without prejudice to defendant's right to object to the admission of evidence obtained from his records.*" (Emphasis supplied)

Point III

There is a serious conflict between the Third Circuit and the Second Circuit on a legal question which was used by the Third Circuit in this case as a basis for sidestepping and nullifying the case of *Carroll v. United States,* 354 U. S. 394.

> See *United States v. Maurice A. Wheeler,* 256 F. 2d 745, and *Dictograph Products Company v. Sonotone Corp.,* 230 F. 2d 131.

This conflict is specifically recognized by the Third Circuit, Supra, when they say:

> "In this last conclusion at least we apparently are at odds with the Second Circuit in Dictograph Products Co. v. Sonotone Corp. supra." (P. 52 of Petition)

This is a complete answer to the Argument on this point raised by the Government of the United States on Pages 10 and 11 of its Brief.

Point IV

The Government fails to consider in its Argument the fact that Judge Wallace S. Gourley granted a Motion to Suppress on the first day of September, 1957. In the original Opinion of the Court, the Motion to Suppress the Evidence was granted and the Court totally ignored the Motion to Dismiss the Indictment. The matter of the Indictment was never discussed and never argued before the Court. Thereafter, the Government filed an Appeal to the Third Circuit and then asked leave to withdraw such Appeal because of the belief that it was

precluded from filing the Appeal under the Carroll case. Long after that action was taken, the United States Attorney filed a Motion for Re-Argument presenting no new evidence, and in the course of the Argument on that Motion, objected to the Court taking any action on the dismissal of the Indictment. In spite of that, the Court voluntarily reiterated its former position on the Motion to Suppress the Evidence and voluntarily, without any request and obviously only for the purpose of giving the Government an opportunity to Appeal from the Motion to Suppress, proceeded to dismiss the Indictment.

CONCLUSION

For the reasons mentioned in our Petition for Certiorari as supplemented by the above, we respectfully request that the Court issue the Writ of Certiorari.

Respectfully submitted,

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